

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ATIGEO LLC, et al.,
Plaintiffs,
v.
JOSEPH JONAS,
Defendant.

CASE NO. C08-0679RAJ
ORDER

I. INTRODUCTION

This matter comes before the court on Plaintiffs’ renewed motion for a temporary restraining order (“TRO”) (Dkt. # 14). For the reasons stated herein, the court DENIES the motion and directs Plaintiffs to file a motion for preliminary injunction if they wish to continue to seek injunctive relief.

II. BACKGROUND

The court first addressed this action in a May 5, 2008 order (Dkt. # 11) denying Plaintiffs’ motion for an ex parte TRO. The court incorporates that order’s findings of fact, and summarizes them briefly. Defendant Joseph Jonas was Plaintiffs’ chief software architect until Plaintiffs terminated him on April 23, 2008. While working for Plaintiffs, he executed two agreements which purport to transfer intellectual property that he developed both during and before his employment. The first of those agreements (“First

1 IP Agreement”) contains a covenant not to compete with Plaintiffs for two years
2 following his employment.

3 On the day of Mr. Jonas’s termination, he sent an e-mail to more than 100
4 customers, potential customers, business contacts, investors, and other persons connected
5 with Plaintiffs. In the e-mail, he stated that the second agreement he entered with
6 Plaintiffs (“Second IP Agreement”) is void, and that he disputed Plaintiffs’ ownership of
7 all or part of their intellectual property.

8 In the wake of the April 23 e-mail, Plaintiffs filed this action and an ex parte
9 motion for a TRO. They sought an injunction to prevent Mr. Jonas from disputing
10 ownership of Plaintiffs’ intellectual property, to prevent him from communicating about
11 that dispute with third parties, and to prevent him from disclosing their confidential
12 information. Some of that information was allegedly stored on two laptop computers that
13 Mr. Jonas retained from his employment.

14 The court denied Plaintiffs’ motion for two reasons. First, despite Plaintiffs’
15 attempts to provide Mr. Jonas with actual notice of this action and the pending TRO,
16 there was no indication that Mr. Jonas received notice. At no time prior to the court’s
17 May 5 order did Mr. Jonas submit anything to the court. Second, the court found no
18 evidence of irreparable harm or the likelihood of irreparable harm. The court explicitly
19 found “no basis to conclude that it is likely Mr. Jonas will unlawfully use, sell, or transfer
20 the disputed intellectual property.” May 5 order at 5. The court also noted that although
21 there was evidence that Mr. Jonas had breached non-disclosure obligations, there was “no
22 evidence that those breaches have resulted or will result in irreparable harm to Plaintiffs.”
23 *Id.*

24 The court extended Plaintiffs the option to renew their motion for a TRO by
25 “either formally serving Mr. Jonas or providing him with actual notice of [the May 5]
26 order and of their renewal of this motion.” *Id.* at 8. More than four months later, on
27 September 19, Plaintiffs served Mr. Jonas with the summons and complaint, the May 5

1 order, and their motion for a TRO from last spring. On September 22, they filed a notice
2 that they were renewing their motion for temporary restraining order. Other than
3 evidence of their service of documents on Mr. Jonas, Plaintiffs provided no new evidence
4 to support the renewed motion.

5 Mr. Jonas's first submission to the court came on September 29, 2008. Mr. Jonas
6 opposed the entry of a TRO, noting Plaintiffs' failure to provide any new evidence of
7 irreparable harm. He also provided evidence about the circumstances surrounding the
8 Second IP Agreement, how he obtained the e-mail addresses he used in his April 23 e-
9 mail, his retention of Plaintiffs' laptop computers, and his conduct with respect to
10 Plaintiffs' disputed intellectual property. Jonas Decl. ¶¶ 5, 7-8. He declared that, despite
11 his disputes with Plaintiffs, he had "not used, disclosed, transferred, licensed, sold, or
12 offered to license or sell, the software at issue in this matter[,] [and has] no intention of
13 doing so until this matter is resolved." *Id.* ¶ 9.

14 Although the May 5 order permitted no reply briefing, Plaintiffs filed a reply brief
15 on September 30. Whereas Plaintiffs provided no new evidence when they renewed their
16 motion for a TRO, they submitted substantial new evidence in conjunction with their
17 reply brief. Among other things, they submitted evidence that Mr. Jonas has been
18 associating with Opspring LLC ("Opspring"), which is apparently an enterprise that
19 competes with Plaintiffs.¹ They also submitted an August 29 e-mail that Mr. Jonas sent
20 to Plaintiffs' Chief Executive Officer, Michael Sandoval, in which Mr. Jonas proposed
21 various means of resolving the intellectual property dispute. Sandoval Decl., Ex. 1. Mr.
22 Jonas sent the e-mail from the address "raduionbisca@gmail.com." Although the address
23 suggests that the sender of the e-mail was Radu Bisca, one of Plaintiffs' software

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25 ¹ The evidence of Mr. Jonas's association with Opspring is thin. One of Plaintiffs' employees
26 traced a September 4 e-mail from Mr. Jonas and concluded that it originated from Opspring's
27 local area network. Leseberg Decl. ¶¶ 4-8. Later, Plaintiffs sent a private investigator to
28 Opspring's offices. In response to a question from the investigator, an Opspring employee stated
that Mr. Jonas would be in the office between 3:00 p.m. and 3:30 p.m. Peyovich Decl. ¶¶ 3-5.
There is no evidence regarding what, if anything, Mr. Jonas is doing for Opspring.

1 engineers, it is plain from the content of the e-mail and Mr. Sandoval’s response that Mr.
2 Sandoval was aware at all relevant times that Mr. Jonas sent the e-mail.

3 On September 3, Mr. Bisca sent Mr. Jonas an e-mail demanding that he not use the
4 “raduionbisca” e-mail address. Mr. Jonas responded on September 4 with a lengthy e-
5 mail disparaging Mr. Sandoval and reiterating his disputes over ownership of intellectual
6 property. Bisca Decl., Ex. 3.² Among other things, Mr. Jonas declared that Mr. Sandoval
7 “should say thank you that I didn’t ally with any of his enemies, yet.” *Id.*

8 Plaintiffs also provide evidence that one of their investors filed suit against them
9 and Mr. Sandoval in May 2008 in King County Superior Court. Trotta Decl., Exs. 1-3.
10 The evidence is skeletal, but the investor appears to allege that Mr. Sandoval
11 inappropriately used the investor’s funds for his personal gain. The complaint in the state
12 court action briefly mentions Mr. Jonas, and avers that uncertainty over the ownership of
13 Plaintiffs’ critical intellectual property has “hampered the sales and investment
14 prospects” of Plaintiffs and their prospects for repaying their debt to the investor. Trotta
15 Decl., Ex. 1 (First Amended Compl. ¶¶ 28-29).

16 Finally, Mr. Sandoval declared that Mr. Jonas’s retention of Plaintiffs’
17 confidential information had harmed them. His declaration provides few details, but
18 states that some combination of Mr. Jonas’s conduct and the state court lawsuit have led
19 potential investors and business partners to decline to do business with Plaintiffs.
20 Sandoval Decl. ¶ 2.

21 On October 1, Mr. Jonas requested that the court either ignore the new evidence
22 Plaintiffs submitted, or permit him to submit additional briefing to counter it. Plaintiffs
23 acceded to the request for additional briefing, but Mr. Jonas has not made further
24 submissions to the court.

25 ² Mr. Bisca and Mr. Jonas e-mailed each other in Romanian, their native language. Bisca Decl.,
26 Exs. 1, 2. Mr. Bisca translated both e-mails into English to submit them to the court. *Id.*, Ex. 3.
27 Although the court has no reason to doubt Mr. Bisca’s translation ability, the court would not
28 ordinarily rely upon a translation from a witness employed by a party. The court relies on Mr.
Bisca’s translation in resolving this motion only because it does not prejudice Mr. Jonas.

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III. ANALYSIS

A. The Court Denies the Motion for TRO Based on the Record in this Action as of September 29.

For reasons not apparent to the court, Plaintiffs chose to renew their motion for a TRO without providing any new evidence to establish irreparable harm or the threat of irreparable harm. This choice is curious, because it appears that all of the new evidence that Plaintiffs later submitted was in their possession when they renewed the motion. Withholding the evidence until after Mr. Jonas had responded to the motion was unfair to him, and, on the record before the court, unjustified.

Even if Mr. Jonas had not responded to the renewed motion for TRO, the court would have denied the motion for the reasons stated in the May 5 order. Although Plaintiffs provided Mr. Jonas with notice of this action and their motion for TRO for the first time, they did nothing in their “renewed” motion to rectify their failure to establish irreparable harm.

Mr. Jonas’s response to the renewed motion for TRO only strengthens the court’s basis for denying the motion. Critically, Mr. Jonas declares that he has no intention of misusing the disputed intellectual property at the heart of this dispute. He also declares that he retains only one laptop from his employment, disputing Plaintiffs’ contention that he kept two. Moreover, he is prepared to turn over the laptop to his counsel for preservation.

On this record, the court must deny Plaintiffs’ motion for a TRO. It does so for the reasons stated in the May 5 order, amended only to reflect that Mr. Jonas has now had an opportunity to respond to the motion, and that his response strengthens the court’s conclusion that Plaintiffs have neither suffered irreparable harm nor established that it is likely that they will suffer irreparable harm.

1 **B. The New Evidence Plaintiffs Submitted on September 30 Does Not Justify**
2 **Expediting Plaintiffs' Request for Injunctive Relief.**

3 Although the court declines to consider Plaintiffs' new evidence as a basis for
4 granting their motion, it has reviewed their new evidence to determine if the court should
5 require an expedited response from Mr. Jonas. In that case, the court would treat the new
6 evidence as the opening salvo in a new motion for TRO, and consider that evidence and
7 Mr. Jonas's response on an expedited basis. After reviewing the evidence, however, the
8 court concludes that it does not suggest a threat of imminent harm that warrants expedited
9 review. Moreover, the new evidence raises questions that neither the evidence nor the
10 limited briefing accompanying it answer.

11 First, the court finds that nothing in Mr. Jonas's e-mails to Mr. Sandoval and to
12 Mr. Bisca is inconsistent with his declaration that he will not misuse Plaintiffs'
13 confidential information or disputed intellectual property until this dispute is resolved.
14 Indeed, with one minor exception, those e-mails simply reiterate Mr. Jonas's belief that
15 he owns the disputed intellectual property, and that the Second IP Agreement is void.
16 The court cannot, at least not on the current record, restrain Mr. Jonas's right to state his
17 own position in the dispute over the intellectual property. Plaintiffs make much of Mr.
18 Jonas's statement in his e-mail to Mr. Bisca that he has not "all[ied] with any of [Mr.
19 Sandoval's] enemies, *yet*." Bisca Decl., Ex. 3 (emphasis added). They assert that this is
20 a veiled threat that Mr. Jonas will violate his agreements with Plaintiffs. When compared
21 with other evidence in the record, the court finds no reason to elevate this stray remark
22 (one that was translated by a witness with interests adverse to Mr. Jonas) into a credible
23 threat that Mr. Jonas will violate his agreements. Indeed, although it has been nearly six
24 months since Mr. Jonas's termination, there is no evidence that he has misused
25 intellectual property in that time. At best there is evidence of minor violations of his
26 confidentiality obligations, and a possible violation of his non-compete agreement.

1 The court notes with interest the evidence that Mr. Jonas has begun some form of
2 association with Opspring, a competing business. But that evidence fails to answer
3 nearly every important question that arises from it. What is Opspring's business? How
4 does it compete with Plaintiffs? What does Mr. Jonas do at Opspring, if anything? How
5 long has he been associated with Opspring? The court cannot infer from the bare fact
6 that Mr. Jonas has some association with an alleged competitor that he is violating the
7 law or that Plaintiffs will be harmed by his conduct.

8 The same lack of detail clouds Plaintiffs' new evidence regarding the impact of
9 Mr. Jonas's conduct on its relations with customers and investors. The most specific
10 evidence is Mr. Sandoval's statement that "a signed letter of intent has been cancelled as
11 a direct result of [Mr.] Jonas's April 23, 2008 email blast." Sandoval Decl. ¶ 3. Still, the
12 evidence reveals little. What letter of intent was cancelled? What was the loss to
13 Plaintiffs? How did Mr. Jonas's unlawful conduct cause that loss? Other evidence is
14 even less specific. The court cannot award injunctive relief based on Mr. Sandoval's bare
15 declaration that unspecified investors have "backed off" from Plaintiffs, or that
16 unspecified "partners" have turned to other businesses. *Id.* Detailed evidence that
17 connects these losses to Mr. Jonas's allegedly unlawful conduct might well support a
18 request for injunctive relief. The lack of such detail in the evidence before the court is
19 conspicuous.

20 Moreover, Plaintiffs generally fail to segregate the consequences of Mr. Jonas's
21 unlawful conduct from conduct that is presumably lawful. As the court has noted, it is
22 unaware of any authority that would permit it to prevent Mr. Jonas from airing his side of
23 the dispute surrounding the intellectual property at issue. There is no indication that this
24 conduct violates either of the intellectual property agreements or any other law that
25 Plaintiffs assert against Mr. Jonas. At the same time, it appears that the disputed
26 intellectual property is critical to Plaintiffs' business, so it would not be surprising if
27 knowledge of the Mr. Jonas's claim to ownership makes investors and customers wary.

1 Nonetheless, without legal argument absent from the motions before the court, there is no
2 basis to prevent Mr. Jonas from asserting his position. Mr. Jonas's agreements with
3 Plaintiffs, at least on their face, prohibit disclosure of certain confidential information,
4 misuse of intellectual property, and employment at competing businesses. They do not
5 prevent Mr. Jonas from airing his disputes with Plaintiffs.

6 In a similar vein, Plaintiffs do not segregate the state court lawsuit as a cause of
7 the harms of which they complain. Mr. Sandoval avers, in part, that the "the confidence
8 of Plaintiffs' investors and business partners was shaken" as a result of the lawsuit.
9 Sandoval Decl. ¶ 3. Plaintiffs, however, fail to explain how the consequences of a
10 lawsuit by a third party can be a basis for awarding injunctive relief against Mr. Jonas.

11 Finally, the court notes that some of the new evidence is simply poorly fitted to the
12 motion for TRO that Plaintiffs' filed nearly six months ago. For example, when they first
13 filed the motion, Plaintiffs had no reason to raise the non-compete agreement as a basis
14 for relief against Mr. Jonas. There is some evidence that Mr. Jonas may be working for a
15 competing enterprise, but there is no legal argument regarding the enforceability of the
16 non-compete agreement.


17 Upon reviewing the new evidence, the court concludes that it does not give the
18 court cause to award injunctive relief without giving Mr. Jonas a full opportunity to
19 respond, and without requiring Plaintiffs' to tailor a request for injunctive relief to
20 encompass the new evidence and the unanswered questions that it raises. Plaintiffs may
21 file a motion for preliminary injunction and note it for consideration in accordance with
22 the court's local rules. The court will also consider a request for limited expedited
23 discovery to support that motion, provided that Plaintiffs first meet and confer with Mr.
24 Jonas to determine if they can agree on the scope and timing of that discovery. If the
25 parties are unable to agree, they shall contact the court to arrange a teleconference.
26 Similarly, Plaintiffs may request an expedited briefing schedule for the motion for
27 preliminary injunction, provided that they first meet and confer with Mr. Jonas. Again, if

1 the parties are unable to agree regarding expediting briefing, they shall contact the court
2 for a teleconference.

3 **IV. CONCLUSION**

4 For the reasons stated above, the court DENIES Plaintiffs' renewed motion for a
5 TRO (Dkt. # 14). If Plaintiffs wish to continue their quest for injunctive relief, they must
6 file a motion for preliminary injunction in accordance with this order.

7 DATED this 20th day of October, 2008.

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11 The Honorable Richard A. Jones
12 United States District Judge
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